

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ANTHONY G. ACKERMAN,	)	
	)	No. CV-06-0069-CI
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
LINDA S. McMAHON, Commissioner	)	
of Social Security, <sup>1</sup>	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) and Defendant's Motion for Summary Judgment (Ct. Rec. 19). Plaintiff filed a reply on November 16, 2006 (Ct. Rec. 21). The court noted the matter for hearing without oral argument on November 30, 2006. (Ct. Rec. 18.) Attorney Donald C. Bell represents Plaintiff; Special Assistant United States Attorney Terrye E. Shea represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 10.) After reviewing the administrative

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<sup>1</sup>As of January 20, 2007, Linda S. McMahon succeeded Commissioner Jo Anne B. Barnhart as acting Commissioner of Social Security. Pursuant to FRED. R. CIV. P. 25(d)(1), Commissioner Linda S. McMahon should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 record and the briefs filed by the parties, the court **GRANTS**  
2 Defendant's Motion for Summary Judgment (Ct. Rec. 19) and **DENIES**  
3 Plaintiff's Motion for Summary Judgment. (Ct. Rec. 13.)

#### 4 **JURISDICTION**

5 Plaintiff protectively filed applications for Supplemental  
6 Security Income and Disability Insurance Benefits ("DIB") on  
7 December 20, 2001, alleging an onset date of February 17, 1998. (Tr.  
8 103-105, 609-611.) The applications were denied initially and on  
9 reconsideration. (Tr. 53-55, 56-59, 63-65, 613-616, 618-620.) ALJ  
10 Mary Reed held a hearing on July 28, 2004. Plaintiff, medical  
11 expert William Newman, M.D., vocational expert Tom Moreland, and  
12 Plaintiff's sister, Deanna Ackerman, testified. (Tr. 635-692.) On  
13 November 8, 2004, the ALJ issued a decision finding that Plaintiff  
14 was not disabled. (Tr. 20-37.)<sup>2</sup> The Appeals Council denied a request  
15 for review on December 2, 2005. (Tr. 10-13). Therefore, the ALJ's  
16 decision became the final decision of the Commissioner, which is  
17 appealable to the district court pursuant to 42 U.S.C. § 405(g).  
18 Plaintiff filed this action for judicial review pursuant to 42  
19 U.S.C. § 405(g) on March 3, 2006. (Ct. Rec. 1.)

#### 20 **STATEMENT OF FACTS**

21 The facts have been presented in the administrative hearing  
22 transcript, the ALJ's decision, the briefs of both Plaintiff and the  
23 Commissioner, and will only be summarized here.

24 Plaintiff was 37 years old on the date of the ALJ's decision.

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26 <sup>2</sup>In her decision, the ALJ noted that Plaintiff filed a prior  
27 claim on June 4, 1999, which was denied initially and on  
28 reconsideration. Plaintiff did not seek further appeal. (Tr. 20.)

(Tr. 21, 655.) He has an eleventh grade education. (Tr. 21, 655.) Plaintiff has worked as a print shop helper, bindery worker, printer, and welder/fabricator. (Tr. 21.) When he was an infant, doctors removed a large cavernous hemangioma from Plaintiff's thoracic spine with resultant bilateral rhomboid musculature removal. (Tr. 21-22.) He alleges disability due to spine problems resulting from this surgery and headaches since February 17, 1998. (Tr. 21, 23.)

#### SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a Plaintiff is not only unable to do previous work but cannot, considering Plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are

1 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
2 the decision maker proceeds to step two, which determines whether  
3 Plaintiff has a medically severe impairment or combination of  
4 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

5 If Plaintiff does not have a severe impairment or combination  
6 of impairments, the disability claim is denied. If the impairment  
7 is severe, the evaluation proceeds to the third step, which compares  
8 Plaintiff's impairment with a number of listed impairments  
9 acknowledged by the Commissioner to be so severe as to preclude  
10 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
11 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the  
12 impairment meets or equals one of the listed impairments, Plaintiff  
13 is conclusively presumed to be disabled. If the impairment is not  
14 one conclusively presumed to be disabling, the evaluation proceeds  
15 to the fourth step, which determines whether the impairment prevents  
16 Plaintiff from performing work which was performed in the past. If  
17 a Plaintiff is able to perform previous work, that Plaintiff is  
18 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
19 416.920(a)(4)(iv). At this step, Plaintiff's residual functional  
20 capacity ("RFC") assessment is considered. If Plaintiff cannot  
21 perform this work, the fifth and final step in the process  
22 determines whether Plaintiff is able to perform other work in the  
23 national economy in view of Plaintiff's residual functional  
24 capacity, age, education and past work experience. 20 C.F.R. §§  
25 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137  
26 (1987).

27 The initial burden of proof rests upon Plaintiff to establish  
28 a *prima facie* case of entitlement to disability benefits. *Rhinehart*

1 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172  
2 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once  
3 Plaintiff establishes that a physical or mental impairment prevents  
4 the performance of previous work. The burden then shifts, at step  
5 five, to the Commissioner to show that (1) Plaintiff can perform  
6 other substantial gainful activity, and (2) a "significant number of  
7 jobs exist in the national economy" which Plaintiff can perform.  
8 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### 9 STANDARD OF REVIEW

10 Congress has provided a limited scope of judicial review of a  
11 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
12 the Commissioner's decision, made through an ALJ, when the  
13 determination is not based on legal error and is supported by  
14 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
15 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
16 "The [Commissioner's] determination that a plaintiff is not disabled  
17 will be upheld if the findings of fact are supported by substantial  
18 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983)  
19 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a  
20 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup>  
21 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
22 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of*  
23 *Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988).  
24 Substantial evidence "means such evidence as a reasonable mind might  
25 accept as adequate to support a conclusion." *Richardson v. Perales*,  
26 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences  
27 and conclusions as the [Commissioner] may reasonably draw from the  
28 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,

1 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as  
2 a whole, not just the evidence supporting the decision of the  
3 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)  
4 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

5 It is the role of the trier of fact, not this court, to resolve  
6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
7 supports more than one rational interpretation, the Court may not  
8 substitute its judgment for that of the Commissioner. *Tackett*, 180  
9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
10 Nevertheless, a decision supported by substantial evidence will  
11 still be set aside if the proper legal standards were not applied in  
12 weighing the evidence and making the decision. *Brawner v. Secretary*  
13 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987).  
14 Thus, if there is substantial evidence to support the administrative  
15 findings, or if there is conflicting evidence that will support a  
16 finding of either disability or nondisability, the finding of the  
17 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
18 1230 (9<sup>th</sup> Cir. 1987).

#### 19 **ALJ'S FINDINGS**

20 The ALJ found at step one that Plaintiff has not engaged in  
21 substantial gainful activity during any time at issue.<sup>3</sup> At step two,  
22 the ALJ found that the medical evidence established that Plaintiff  
23 suffered from the severe impairments of post blood vessel tumor,  
24 removed as a child; degenerative disc disease of the cervical spine;

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25  
26 <sup>3</sup>Although Plaintiff has worked sporadically since the date of  
27 onset, the ALJ notes that records reflect work at a level less than  
28 substantial gainful activity. (Tr. 21-22.)

1 post rib fracture; and alcohol/polysubstance abuse. (Tr. 30, 36.)  
2 Though Plaintiff's impairments are considered severe, the ALJ  
3 concluded that he does not have an impairment or combination of  
4 impairments listed in or medically equal to one of the Listings  
5 impairments. (Tr. 30, 36.)

6 After finding Plaintiff's testimony regarding his limitations  
7 not fully credible, the ALJ concluded that Plaintiff has the RFC to  
8 perform a full range of work at the medium exertion level; he is  
9 limited in that he cannot work overhead work more than occasionally.  
10 (Tr. 35-36.) At step four the ALJ considered the vocational  
11 expert's testimony and concluded that, because Plaintiff has the RFC  
12 to perform all of his past work as he previously performed it, he  
13 was not disabled within the meaning of the Social Security Act. (Tr.  
14 35-37.) The ALJ found that Plaintiff's episodic polysubstance abuse  
15 was not a contributing factor material to his disability. (Tr. 35.)

#### 16 ISSUES

17 Plaintiff contends that the Commissioner erred as a matter of  
18 law. Specifically, he argues that the ALJ failed to: (1) properly  
19 weigh the medical evidence; (2) properly assess his credibility and  
20 that of lay witnesses; (3) adequately develop the record; and (4)  
21 include all of his limitations in the hypothetical. (Ct. Rec. 13-2  
22 at 12-19.)

23 The Commissioner opposes the Plaintiff's Motion and asks that  
24 the ALJ's decision be affirmed. (Ct. Rec. 19 at 10.)

#### 25 DISCUSSION

##### 26 A. Weighing Medical Evidence

27 In social security proceedings, the claimant must prove the  
28 existence of a physical or mental impairment by providing medical

1 evidence consisting of signs, symptoms, and laboratory findings; the  
2 claimant's own statement of symptoms alone will not suffice. 20  
3 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
4 the basis of a medically determinable impairment which can be shown  
5 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical  
6 evidence of an underlying impairment has been shown, medical  
7 findings are not required to support the alleged severity of  
8 symptoms. *Bunnell v. Sullivan*, 947, F.2d 341, 345 (9<sup>th</sup> Cr. 1991).

9 A treating or examining physician's opinion is given more  
10 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
11 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
12 physician's opinions are not contradicted, they can be rejected only  
13 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,  
14 830 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may reject an opinion  
15 if he states specific, legitimate reasons that are supported by  
16 substantial evidence. See *Flaten v. Secretary of Health and Human*  
17 *Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical  
18 reports in the record, the analysis and opinion of a non-examining  
19 medical expert selected by an ALJ may be helpful to the  
20 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995)  
21 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)).  
22 Testimony of a medical expert may serve as substantial evidence when  
23 supported by other evidence in the record. *Id.*

24 Plaintiff contends that the ALJ erred by rejecting the opinions  
25 of treating physicians David J. Houghland, M.D., and Stuart Freed,  
26 M.D., and of D.D.S. physician Morris Fuller, M.D., in favor of the  
27 opinion of the testifying medical expert, William Newman, M.D. (Ct.  
28 Rec. 13-2 at 12-13.) The Commissioner responds that the ALJ properly



1 weighed the medical evidence. (Ct. Rec. 19 at 11-14.)

2 The ALJ points out the medical records show that Plaintiff  
3 complained of mid back pain on October 11, 1993, more than four  
4 years prior to the February 1998 date of onset:

5 A lumbosacral spine series revealed possible compression  
6 fracture of T12 and a sclerotic healing fracture at the  
7 anterior superior end plate in the lower lumbar area. He  
8 reported no other back injuries but gives a history of  
9 lifelong problems with recurrent low back pain that is  
10 treated with regular chiropractic manipulations. The  
11 claimant underwent a bone scan that did not show any areas  
12 of unusual activity in the spine. On October 19, 1993, he  
is reported to be feeling somewhat better but still having  
upper lumbar pain and complains of some left shoulder pain  
with abduction. Physical examination reveals some  
impingement syndrome but otherwise unremarkable. The  
orthopedic surgeon (Dr. Volkmann) released the claimant  
for light duty work and a program for rotator cuff  
strengthening. (Ex. 10F, pp. 1-7.)

13 (Tr. 22, citing Tr. 380-386.) (Footnote omitted.)

14 Dr. David Houghland first saw Plaintiff on April 28, 1994, when  
15 he noted that a lumbar spine x-ray revealed what was probably an old  
16 compression fracture of T12 but which was otherwise unremarkable,  
17 and bone scans were normal. Plaintiff was taking no medication and  
18 said he experienced a migraine headache every week or two. (Tr.  
19 387.) Dr. Houghland assessed chronic low back pain and muscle  
20 contraction and migraine headaches. (Tr. 388.) He told Plaintiff  
21 that he might not be able to be symptom free with respect to his  
22 back pain, but recommended a back rehabilitation program. Dr.  
23 Houghland noted Plaintiff's posture was poor. (Tr. 388.) About a  
24 month later, Plaintiff told Dr. Houghland his back had improved a  
25 great deal. (Tr. 389.) Dr. Houghland began Plaintiff on Nadolol for  
26 headaches. (Tr. 390-391.) About six weeks later, Plaintiff reported  
27 having no severe headaches since his last visit. (Tr. 392.) On July  
28 25, 1994, Dr. Houghland reviewed a lumbar MRI showing no obvious

1 structural problems. (Tr. 393.) Dr. Houghland told Plaintiff he  
2 needed to work on back mechanics and exercise. (Tr. 393.) On  
3 September 1, 1994, neurosurgeon Dr. Mead reviewed Plaintiff's  
4 thoracic MRI. The scan was normal. Dr. Mead opined that Plaintiff  
5 was suffering from musculoskeletal overuse due to working 100 hours  
6 per week at a printing press. (Tr. 395.)

7 On November 15, 1994, Plaintiff was involved in a motor vehicle  
8 accident, given a medical note preventing him from working until  
9 November 21, 1994, and referred for four physical therapy sessions.  
10 (Tr. 397.) On January 17, 1995, Plaintiff was given an exercise  
11 program for stretching the neck and scapula areas. (Tr. 399.) Dr.  
12 Houghland began a trial of antidepressants for Plaintiff's  
13 headaches, and noted two weeks later that Plaintiff's response to  
14 amitriptyline was excellent. (Tr. 402-403.) Dr. Houghland's last  
15 record, October 29, 1996, states that Plaintiff said that his  
16 headaches clearly improved when he left employment at the print shop  
17 due to fumes. (Tr. 406.) Plaintiff was experiencing one or two  
18 migraines a month; Dr. Houghland restarted amitriptyline. (Tr. 406-  
19 407.)

20 Plaintiff claims the ALJ also failed to properly credit Dr.  
21 Stuart Freed, M.D.'s, opinions. On June 20, 1997 (before the  
22 February 1998 onset date), Plaintiff saw Dr. Freed, who observed  
23 that all of Plaintiff's x-rays and MRI's have been unremarkable.  
24 (Tr. 408.) The ALJ notes that after his exam, Dr. Freed opined that  
25 Plaintiff's problem was essentially biomechanical because of his  
26 surgically removed rhomboid musculature (as an infant) and it was  
27 felt that doctors might be able to retract the Plaintiff's scapula  
28 using the remaining musculature if they could get it to move. (Tr.

32, citing Tr. 409.) The ALJ notes that Dr. Freed placed Plaintiff in a figure of eight clavicle splint and referred him for deep tissue massage and mobilization of both scapulas. Plaintiff was to follow up in three weeks. (Tr. 32, citing Tr. 409.) The ALJ points out that the Plaintiff did not return until April 13, 1998, ten months later. (Tr. 32, citing Tr. 410-411.) Plaintiff complained of back spasms; he was noted to have been working 10 to 12 hour days; trapezius and paraspinal spasms made it impossible for Plaintiff to hold up his grinder and he had to stop working. (Tr. 32, citing Tr. 410.) Dr. Freed assessed chronic episodic mid-back spasm and pain primarily related to trying to work with the absence of complete rhomboid musculature and normal scapular motion. (Tr. 32, citing Tr. 410.) Dr. Freed again stressed physical therapy to try to get the scapula to track better and give Plaintiff more muscle balance. (Tr. 32, citing Tr. 410.) The ALJ notes that Plaintiff told Greg Summers, D.C., on March 2, 1998, that he was unable to follow through with Dr. Freed's recommendations because of job demands and personal finances. (Tr. 32, citing Tr. 337-338.)

On December 12, 2001, Plaintiff reported that his symptoms were exacerbated by an ATV accident. (Tr. 32, citing Tr. 415-417.) Dr. Freed opined that Plaintiff has significant post-traumatic degenerative changes in his thoracic spine and these are likely to always be present. (Tr. 32, citing Tr. 417.) Dr. Freed opined that Plaintiff's spine would make it difficult to continue manual labor; he felt that Plaintiff should look at vocational retraining. The ALJ points out Dr. Freed's comment that Plaintiff seems to have excellent mechanical abilities and skills and with proper education could be very well-suited for that work force. (Tr. 32, citing Tr.

1 417.) The ALJ notes that on July 14, 2003, (six months after date  
2 last insured), Dr. Freed assessed chronic thoracic and neck pain  
3 secondary to muscle dysfunction and loss and post-traumatic changes,  
4 and "only recommended that he try Paxil and that he restart some  
5 exercises and stretching that he was instructed on in previous  
6 visits." (Tr. 32, citing Tr. 509.) On August 23, 2004, Dr. Freed  
7 indicated that the Plaintiff is capable of sitting, standing and  
8 walking for a total of 4 hours at one time, up to a total of 8 hours  
9 in an 8-hour workday; capable of frequently lifting and carrying up  
10 to 20 pounds and occasionally 21 to 50 pounds; limited to occasional  
11 twisting of his neck, maintaining a flexed neck position and  
12 maintaining a forward bent position. (Tr. 29, citing Tr. 594-595.)

13 The other opinion Plaintiff contends the ALJ discounted was  
14 that of D.D.S. physician Morris Fuller, M.D., Dr. Fuller reviewed  
15 the record and on June 3, 2003, assessed an RFC for sedentary work.  
16 (Tr. 436-443.) At the hearing, the ALJ referred to this assessment  
17 when she told the medical expert that an agency physician opined  
18 that Plaintiff would not be able to lift and carry over 10 pounds.  
19 (Tr. 647.) Dr. William Newman, M.D., testified, "I don't know why  
20 they said that. I have many exhibits here that say he has normal  
21 strength and no atrophy." (Tr. 647.)

22 When she weighed the opinions of Drs. Houghland, Freed and  
23 Fuller, the ALJ relied in part on the results of a motor system exam  
24 on August 14, 1999, by Saleem Khamisani, M.D. (Tr. 32, citing Tr.  
25 340-343.) (This exam occurred about a year and a half after the date  
26 on onset.) Dr. Khamisani noted Plaintiff had normal bulk and tone  
27 in all four extremities. His strength was 5/5 in the upper and lower  
28 extremities with no focal atrophy or fasciculations noted. Plaintiff

1 had no radicular symptoms and no neurological findings on exam. Dr.  
2 Khamisani opined that Plaintiff's combination of migraine and  
3 tension headaches are not disabling and should not restrict his work  
4 activities. The ALJ observed: "Dr. Khamisani further opined that the  
5 claimant has no objective findings and therefore, no work related  
6 restrictions are identified." (Tr. 32, citing Tr. 343.)

7 When evaluating the opinions of the treating doctors, the ALJ  
8 considered the medical expert's testimony as well. Dr. Newman agreed  
9 that Plaintiff has some restriction of motion in the scapula because  
10 of scarring. (Tr. 28, citing Tr. 644.) Dr. Newman pointed out that  
11 there is some conflict in the record with respect to Plaintiff's  
12 restricted motion, with at least one doctor assessing such a  
13 restriction while other exams reveal no weakness or atrophy and  
14 "good motor strength and normal reflexes and sensation." (Tr. 29,  
15 citing Tr. 644.) Dr. Newman testified that Plaintiff incurred  
16 injuries from a motor vehicle accident, including left rib fractures  
17 and neck stiffness. (Tr. 29.) X-rays revealed degeneration of C5. An  
18 MRI of the dorsal spine was negative, as was an x-ray of the lumbar  
19 spine. Dr. Newman testified that all reports indicate essentially  
20 normal physical examinations. Plaintiff shows no neurological  
21 deficits and, for the most part, his range of motion is normal. (Tr.  
22 29.) Dr. Newman opined that Plaintiff has no real permanent physical  
23 impairments, and is capable of medium work with frequent bending up  
24 to 2/3 of the day and only occasional overhead work. (Tr. 29.)

25 The ALJ considered Plaintiff's credibility and found him less  
26 than completely credible. (Tr. 31) After considering Plaintiff's  
27 credibility, the lay and other medical evidence, the ALJ adopted the  
28 RFC articulated by Dr. Newman. (Tr. 35.) The ALJ noted that Dr.

1 Newman is a specialist in orthopedic surgery and had reviewed the  
2 entire medical record, whereas Dr. Freed is a family practitioner  
3 who saw Plaintiff sporadically. (Tr. 35.) The ALJ pointed out that  
4 Dr. Newman's RFC is somewhat consistent with Dr. Freed's. The ALJ  
5 also found that because Plaintiff's neck complaints to Dr. Freed  
6 were based on less than credible self-reporting, "diminished weight  
7 is given to the postural limitations assessed by the treating  
8 physician." (Tr. 35.) Credibility determinations bear on the  
9 evaluation of medical evidence when an ALJ is presented with  
10 conflicting medical opinions. *Webb v. Barnhart*, 433 F.3d 683, 688  
11 (9<sup>th</sup> Cir. 2005).

12 Plaintiff's allegation that the ALJ improperly rejected the  
13 opinions of Drs. Houghland, Freed and Fuller in favor of Dr.  
14 Newman's is not supported by the record. As noted, the ALJ gave  
15 less weight to Dr. Freed's assessed postural limitations because Dr.  
16 Freed is a family practitioner who saw Plaintiff sporadically. Dr.  
17 Freed indicated he thought that Plaintiff was a good candidate for  
18 vocational retraining--not that he was disabled. The ALJ relied on  
19 the results of objective testing (MRI's, x-rays, and examination  
20 results) and on the medical expert's opinion when weighing the  
21 opinions of Plaintiff's treating and consulting physicians. This  
22 too was proper.

23 When presented with conflicting medical opinions, the ALJ must  
24 determine credibility and resolve the conflict. *Matney v. Sullivan*,  
25 981 F.2d 1016, 1019 (9th Cir. 1992). Dr. Freed's assessment of  
26 greater limitations is contradicted by examining physician  
27 Khamisani, M.D., by the results of objective testing, by Plaintiff's  
28 noted failure to follow-up on Dr. Freed's treatment recommendations,

1 by Dr. Newman's testimony, and by Plaintiff's ability to work even  
2 after the date of onset: "The record reveals that the claimant's  
3 allegedly disabling impairments were present at approximately the  
4 same level of severity from the alleged onset date. Yet, there are  
5 references in the record to work activity." (Tr. 33.)

6 The ALJ specified some of references to Plaintiff's work  
7 activities: metal fabrication (2003); recycling for a college and  
8 other customers (2000 and 2001); working 10 to 12 hour days,  
9 unspecified employer (April 1998); self-employed since 1998 (first  
10 in a steam cleaning business that did not work out, followed by  
11 buying a business and making jigs and welding, where Plaintiff  
12 worked for one and a half to 2 years); and Exhibit 20E, which  
13 describes working 40 hours a week for \$8.00 an hour. (Tr. 33.) As  
14 the ALJ opined: "The fact that the impairments did not prevent the  
15 claimant from working at that time strongly suggests that it would  
16 not currently prevent work." (Tr. 33.)

17 The ALJ gave specific and legitimate reasons for rejecting the  
18 more severe limitations assessed by Plaintiff's treating physician,  
19 Dr. Freed. The undersigned finds that the ALJ's weighing of the  
20 medical evidence is supported by substantial evidence in the record  
21 as a whole and is free of legal error.

22 **B. Assessing Plaintiff's and Lay Witness Credibility**

23 Plaintiff's Credibility

24 Plaintiff contends the ALJ erred by finding him less than  
25 completely credible. Specifically, Plaintiff asserts that the ALJ  
26 erred by failing to take into consideration and properly evaluate  
27 his pain and fatigue, and failed to give "clear and convincing"  
28 reasons for rejecting this testimony. (Ct. Rec. 13-2 at 13-16.)

1 The Commissioner responds that the ALJ's assessment was based on  
2 proper legal standards and supported by the record. (Ct. Rec. 19 at  
3 12-16.)

4 It is the province of the ALJ to make credibility  
5 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
6 1995). However, the ALJ's findings must be supported by specific  
7 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
8 1990). Once the claimant produces medical evidence of an underlying  
9 impairment, the ALJ may not discredit testimony as to the severity  
10 of an impairment because it is unsupported by medical evidence.  
11 *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent  
12 affirmative evidence of malingering, the ALJ's reasons for rejecting  
13 the claimant's testimony must be "clear and convincing." *Lester v.*  
14 *Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are  
15 insufficient: rather the ALJ must identify what testimony is not  
16 credible and what evidence undermines the claimant's complaints."  
17 *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup>  
18 Cir. 1993).

19 The ALJ determined that Plaintiff's allegations regarding his  
20 pain and limitations were less than fully credible. (Tr. 31.) She  
21 noted that Plaintiff's testimony that he experiences significant  
22 pain and limitation is not supported by the objective medical  
23 evidence of record. (Tr. 31.) A lack of supporting objective  
24 medical evidence is a factor which may be considered in evaluating  
25 an individual's credibility, provided that it is not the sole  
26 factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9<sup>th</sup> Cir. 1991). The  
27 ALJ points out that, in addition, Plaintiff's treatment has been  
28 routine and/or conservative in nature. (Tr. 31.) Treating doctors



1 have not placed restrictions on Plaintiff (other than those assessed  
2 by Dr. Freed after the date of last insured). A neurosurgeon  
3 reported on August 23, 1994, (six months after date of onset) that  
4 Plaintiff moved around quite well, had good strength in his arms and  
5 legs, symmetrical deep tendon reflexes and sensation to prick and  
6 position were normal. (Tr. 31.) An MRI scan was normal, and it was  
7 opined that Plaintiff was suffering from musculoskeletal overuse; he  
8 was advised to cut back to working 10-hour days. (Tr. 31.) On May  
9 26, 1995, Plaintiff finished physical therapy following a car  
10 accident and reported that his back had improved a great deal. It  
11 was not recommended that he stop working. (Tr. 31.) Plaintiff's  
12 treating physicians have not opined that he is unable to work;  
13 instead, they stress retraining. (Tr. 32, citing Tr. 417.)

14 The ALJ considered the results of a neurological exam on  
15 January 30, 1995, by David Pitkethly, M.D., showing that Plaintiff,  
16 overall, was somewhat improved. He had no radicular pain with neck  
17 movements and had 75 percent of normal range of motion of the neck  
18 in all directions. (Tr. 31.)

19 As noted, the ALJ found it significant that Dr. Freed examined  
20 Plaintiff on June 20, 1997, placed him in a clavicle splint,  
21 referred him for deep tissue massage and scapula mobilization, and  
22 directed him to return in three weeks. "The claimant did not return  
23 until April 13, 1998, complaining of back spasms." (Tr. 32.)  
24 Noncompliance with medical care or unexplained or inadequately  
25 explained reasons for failing to seek medical treatment cast doubt  
26 on a claimant's subjective complaints. 20 C.F.R. §§ 404.1530,  
27 426.930; *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). The fact  
28 that Plaintiff failed to comply with the medical treatment

1 prescribed by his physician casts doubt on his claim of disabling  
2 pain and limitations.

3 With regard to daily activities, it is well-established that  
4 the nature of daily activities may be considered when evaluating  
5 credibility. *Fair*, 885 F.2d at 603. The ALJ found that Plaintiff's  
6 allegations of pain and limitation were inconsistent with the record  
7 evidence demonstrating that he was engaged in work at a medium  
8 exertion level after his date of onset (although at levels below  
9 SGA), and testified that he has been self-employed since 1998. (Tr.  
10 33.)

11 The ALJ is responsible for reviewing the evidence and resolving  
12 conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881  
13 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the trier of fact,  
14 not this court, to resolve conflicts in evidence. *Richardson*, 402  
15 U.S. at 400. The court has a limited role in determining whether  
16 the ALJ's decision is supported by substantial evidence and may not  
17 substitute its own judgment for that of the ALJ, even if it might  
18 justifiably have reached a different result upon de novo review. 42  
19 U.S.C. § 405(g).

20 After reviewing the record, the undersigned judicial officer  
21 finds that the ALJ provided clear and convincing reasons for finding  
22 Plaintiff's allegations not fully credible.

23 Lay Witnesses

24 Plaintiff contends that the ALJ failed to properly credit the  
25 testimony of his sister and the written statements by his mother,  
26 his then-fiancé, and a massage therapist. (Ct. Rec. 13-2 at 17-18.)  
27 The Commissioner responds that the ALJ took into account Plaintiff's  
28 conservative treatment, level of work activity after date of onset,

1 and secondary gain factors when she assessed the lay witnesses'  
2 evidence. (Ct. Rec. 19 at 15.)

3 The ALJ may not ignore or improperly reject the probative  
4 testimony of a lay witness without giving reasons that are germane  
5 to each witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir.  
6 1993). The ALJ shall "consider observations by non-medical sources  
7 as to how an impairment affects a claimant's ability to work."  
8 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9<sup>th</sup> Cir. 1987), *citing* 20  
9 C.F.R. § 404.1513(e)(2).

10 The ALJ notes Plaintiff's sister, Deanne Ackerman, "testified  
11 that she has observed the claimant's decrease in his cognitive  
12 ability, focus and aim and that she has seen him dropping tools."  
13 (Tr. 34.) The ALJ points out the evidence contrary to Ms. Ackerman's  
14 testimony: after a psychological exam and testing on March 25, 2004,  
15 Jeffrey Startzel, Psy.D., found that Plaintiff had no cognitive  
16 deficits and is "quite intelligent and should be capable of doing  
17 college level work." (Tr. 34, citing Tr. 572.) With respect to  
18 dropping things, the ALJ observes that "(t)hroughout the records the  
19 claimant is noted to have normal strength and sensation, no  
20 neurological deficits or restrictions on the use of the hand and  
21 (records) do not show any basis for complaints of dropping things."  
22 (Tr. 34.) The ALJ rejected Ms. Ackerman's lay testimony with  
23 germane reasons supported by other competent evidence of record.

24 With respect to the three written statements, the ALJ  
25 explicitly rejected them because they are not supported by objective  
26 medical evidence with respect to Plaintiff's limitations of sitting,  
27 standing and walking. (Tr. 34.) According to Plaintiff's mother,  
28 Susan Stinson, "standing in one place for any length of time" is

1 difficult, and Plaintiff can only walk short distances until it  
2 hurts and he needs to sit and rest. (Tr. 194.) The length of time  
3 and distance are not estimated. Plaintiff's then fiancé, Sandra  
4 Sprague, stated that Plaintiff has "some difficulty moving around  
5 when his muscles get tense or very sore." (Tr. 197.) Wendy  
6 Stanger, a massage therapist, opined that Plaintiff can walk a 1/4  
7 mile without aid and his movements are not fluid. (Tr. 202.) The  
8 ALJ notes:

9 [A]s the weight of the evidence fails to document clinical  
10 abnormalities that could reasonably be expected to have  
11 produced persistent symptoms or work-related limitations  
12 consistent with the allegations of claimant's documentary  
13 witnesses, it must be considered whether their reports  
14 merely constitute a recitation of the claimant's own  
15 subjective allegations that have not been accepted as  
16 fully credible.

17 (Tr. 34.) The ALJ is correct that no medical evidence supports the  
18 lay witnesses' rather general assertions of limitation.  
19 Accordingly, the ALJ did not err with regard to the weight she gave  
20 to the lay witnesses' statements and testimony.

### 21 **C. Developing the Record**

22 Plaintiff contends that the ALJ should have developed the  
23 record further by eliciting testimony from a neurologist to discuss  
24 Plaintiff's migraines and from a psychological expert to discuss his  
25 mental impairments; alternatively, Plaintiff contends that the ALJ  
26 should have sent him to these professionals for a consultative  
27 evaluation. (Ct. Rec. 13-2 at 16-17.) The Commissioner responds  
28 that the record does not support finding that Plaintiff's migraines  
were of a disabling nature. (Ct. Rec. 19 at 15.) With respect to the  
record of Plaintiff's mental impairments, the Commissioner responds  
that Jeffrey Startzel, Psy.D., "examined Plaintiff, administered

1 standard psychological tests, diagnosed mental impairments and  
2 assessed functional limitations due to mental impairments,"  
3 presumably making additional testimony unnecessary. (Ct. Rec. 19 at  
4 14.)

5 The ALJ's duty to further develop the record is triggered by  
6 ambiguous or inadequate evidence in the record. *Mayes v. Massanari*,  
7 276 F. 3d 543, 459-460 (9<sup>th</sup> Cir. 2001).

8 The record was adequate to permit the ALJ to properly evaluate  
9 the evidence in this case. With respect to Plaintiff's headaches,  
10 the ALJ points out Plaintiff's testimony that his last migraine was  
11 "over a year ago and he has learned to avoid them." Because  
12 Plaintiff has learned to avoid the migraines and takes only over-  
13 the-counter medication, the ALJ "finds that it undercuts the  
14 purported severity of the headaches." (Tr. 33.) There is no  
15 ambiguity or lack of evidence triggering the need for additional  
16 testimony or evaluation with respect to Plaintiff's migraines.

17 Similarly, as the Commissioner correctly observed, Plaintiff  
18 underwent a psychological exam and testing with Dr. Startzel. The  
19 ALJ considered this assessment:

20 The undersigned also finds that the claimant has no mental  
21 impairments that would meet the 12 month durational  
22 requirement of the Act. In the ADATSA assessment on  
23 November 14, 2003, the claimant was noted to be very  
24 depressed but, mostly over the loss of his daughter in a  
25 custody battle and cheered up by the end of the  
26 evaluation. (Ex. 16F.) . . . [An intake form] dated  
27 December 10, 2003, note[d] his depression is due to legal  
28 problems, dying grandfather, custody loss of daughter and  
physical problems. By May 25, 2004, the claimant is noted  
to be feeling more in control of his life. The claimant's  
psychological assessment was conducted in March 2004 and  
indicates the claimant has average intelligence quotient,  
average reading and high average working memory. There is  
no evidence to support attention deficit/hyperactivity  
disorder diagnosis. Testing shows no cognitive deficits  
and the diagnosis appears to be based on subjective

1 complaints. The claimant reported to the psychologist  
2 that he has two suicide attempts in the last year yet, in  
3 Exhibit 16F, the claimant denies suicidal thoughts or ever  
attempting suicide. The medical records also do not  
reflect any suicide attempts.

4 (Tr. 34.) The ALJ notes that Plaintiff was not being treated with  
5 antidepressants. (Tr. 34.) The record was sufficient for the ALJ to  
6 make a determination as to Plaintiff's alleged mental impairment.

7 Accordingly, the ALJ did not err by failing to call additional  
8 experts or ordering additional evaluations.

9 **D. Hypothetical to Vocational Expert**

10 Plaintiff contends that the ALJ asked the vocational expert an  
11 incomplete hypothetical, in that the question did not include all of  
12 Plaintiff's impairments supported by the record. (Ct. Rec. 13-2 at  
13 18-19.) The Commissioner does not specifically address this  
14 argument.

15 Plaintiff's argument with respect to the hypothetical is the  
16 same as his first argument: he disagrees with the way the ALJ  
17 weighed the medical testimony. When the ALJ weighed the opinion of  
18 Dr. Freed, she properly considered that some of his assessment was  
19 based on Plaintiff's inconsistent self-reporting. The court finds  
20 that the ALJ appropriately considered the medical evidence, as well  
21 as Plaintiff's credibility in determining his residual functional  
22 capacity. With respect to the ALJ's residual functional capacity  
23 assessment, the undersigned finds that the ALJ's reasons for the  
24 limitations assessed are fully supported by the medical evidence,  
25 objective test results, and by her credibility determination. The  
26 ALJ's assessed RFC is supported by the record and free of legal  
27 error.

28 Plaintiff's argument is the same as that previously raised,

1 that the ALJ did not weigh the medical evidence in the way he would  
2 have wished. For the reasons articulated herein, the court finds  
3 that the ALJ's hypothetical included all of the limitations  
4 established by the medical and other competent evidence of record.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ's conclusions, this  
7 court finds that the ALJ's decision is supported by substantial  
8 evidence and free of legal error. Based on the foregoing, the  
9 undersigned finds that the ALJ properly determined that Plaintiff is  
10 not disabled within the meaning of the Social Security Act.  
11 Accordingly,

12 **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
14 **DENIED.**

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is  
16 **GRANTED.**

17 3. The District Court Executive is directed to enter judgment  
18 in favor of Defendant, file this Order, provide a copy to counsel  
19 for Plaintiff and Defendant, and **CLOSE** this file.

20 DATED February 6, 2007.

21  
22 S/ CYNTHIA IMBROGNO  
23 UNITED STATES MAGISTRATE JUDGE  
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